

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION
2811 Agriculture Drive, P.O. Box 8911
Madison, Wisconsin 53708-8911

IN THE MATTER OF MILK PRODUCER
LICENSE NUMBER 85297 OF CLEARVIEW
ACRES, LLC, HAYWARD, WISCONSIN, AND
MILK PRODUCER LICENSE NUMBER 14958
OF MIDVALLEYVU FARM, ARKANSAW,
WISCONSIN,

RESPONDENTS.

DOCKET NOS. 01-C-62, 01-C-96,
AND 02-C-07
DECISION

SUMMARY OF THE DECISION

The issues were set forth for hearing as follows:

- a. What is the Department's interpretation of s. 97.42(2)(d)2., Wis. Stats., as it relates to the facts set forth in the Respondents' Request for a Declaratory Ruling, submitted to the Department on May 9, 2002?
- b. How does that interpretation affect the complaints filed by the Department's Division of Food Safety against the Respondents in Docket Nos. 01-C-62, 01-C-96, and 02-C-07?
- c. What should be the order of the Department?

I find that:

(1) The Department upholds the long-standing interpretation of the Division of Food Safety that "incidental sales" as used in s. 97. 24(2)(d)2., Wis. Stats., shall not apply to sales which are regularly made in the course of business or are preceded by any advertising, offer to or solicitation of members of the public, but shall include any sales to employees or persons shipping milk to the dairy plant.

(2) The Division of Food Safety shall take immediate steps to reinstate this interpretation to the appropriate rules chapters in the Department's administrative code.

(3) The Respondents' current "cow-share" agreements with any members of the public are not legal ownership agreements that place the transactions outside the requirements of s. 97.24, Wis. Stats. The Respondents, and any other persons similarly situated, have ten days, following their receipt of this order, to cease and desist any practices for the regular delivery of ungraded raw milk in any manner inconsistent with this decision and the requirements of s. 97.24, Wis. Stats., as interpreted by this decision.

(4) Under the long-standing interpretation of s. 97.24, Wis. Stats., the Respondents are free to devise valid agreements sharing ownership in their milk producer license under applicable law that may include allowing actual owners to take a share of the ungraded raw milk produced under the license.

NATURE OF THE CASE

The Wisconsin Department of Agriculture, Trade and Consumer Protection's ("Department") Division of Food Safety ("Division") began these matters by filing a complaint against Clearview Acres, LLC, ("Respondent CVA") on September 18, 2001, alleging violations of s. 97.42(2), Wis. Stats. Department Secretary James E. Harsdorf ("Secretary") assigned Docket No. 01-C-62 to the matter, issued a Notice of Prehearing Conference on September 18, 2001 and assigned Administrative Law Judge Cheryl Furstace Daniels ("ALJ") to hear the case.

An initial prehearing conference was held in the matter on October 18, 2001. Attorney Karl W. Marquardt represented the Division. Attorney Glenn M. Stoddard represented the Respondent. The ALJ set up a schedule for the parties to deal with the Respondent's Motion to Dismiss.

On December 21, 2001, the Division issued a Summary Special Order, Docket No. 01-C-96, against Respondent CVA prohibiting it, its members, agents, and employees, successors or assignees from selling or distributing unpasteurized raw milk, based upon its finding of an imminent health hazard. On January 23, 2002, the Respondent filed a Motion for Reconsideration and Consolidation of Docket Nos. 01-C-62 and 01-C-96.

In the meantime, the Division filed a complaint against Midvalleyvu Farm ("Respondent MVF") on January 16, 2002. The Secretary assigned Docket No. 02-C-7 to the case, issued a Notice of Prehearing Conference on January 17, 2002 and assigned

ALJ Daniels to hear the case. The Respondent filed an answer to the complaint, through its attorney, Glenn M. Stoddard, on February 1, 2002.

The ALJ conducted prehearing conferences in all three cases, in succession, on February 12, 2002. At the hearing, with subsequent agreement by both Respondents, the ALJ decided that it would be best to consolidate the cases for decision. The ALJ also ordered that the Respondents file a Petition for Declaratory Ruling to resolve the issue of the interpretation and applicability of s. 97.24(2)(d)2., Wis. Stats., to the facts set forth in the Respondent's Petition and the complaints filed by the Division.

On May 9, 2002, the Respondents filed a Petition for Declaratory Ruling under s. 227.41, Wis. Stats., Regarding the Applicability of Wis. Stats. S. 97.24(2)(d)2. The Division filed its response to the Motion on July 19, 2002. The Division also took the opportunity to substitute Attorney Teel D. Haas as attorney of record for the Division. The Respondent asked and was granted the opportunity to file a reply brief, which it did on August 30, 2002.

The ALJ issued a proposed decision on September 20, 2002. The Division sent a letter on October 9, 2002, requesting that the final decision reflect some minor typographical corrections but otherwise had no other comments or objections to the Proposed Decision and Order. The Respondents did not file any objections.

Therefore, based upon the record in the matter, including the facts set forth in the Petition, the complaints in the cases, the affidavits and exhibits submitted by the parties, the ALJ's proposed decision, and the request for corrections by the Division, I adopt the ALJ's proposed decision as final for the Department, with the minor technical corrections.

SUMMARY OF THE EVIDENCE

Attached to 5/9/02 Petition for Declaratory Ruling

1. 3/12/02 letter from Attorney Stoddard to Attorney Marquardt , marked as Exhibit A.
2. Affidavit of Tim Wightman (unsigned but with dated signed page sent later), with attached exhibits listed below.
 - a. 5/3/99 letter from Attorney Mark Olm to Neal Sanders, for the Division, marked as Exhibit 1.
 - b. 5/10/00 letter from Attorney Mark Olm to Steven B. Steinhoff, for the Division, marked as Exhibit 2.
 - c. 5/24/00 letter from Carolyn Gallagher for the Division to Attorney Mark Olm, marked as Exhibit 3.
 - d. Memorandum of Understanding between Clearview Acres, LLC and the Department of Agriculture, Trade and Consumer Protection, signed by both parties, marked as Exhibit 4.
 - e. 4/9/01 Termination Notice of #6 above by David D. Tatar for the Division, marked as Exhibit 5.
 - f. Clearview Acres LLC for for Bill of Sale, Boarding Agreement, and Buy-Back Right, marked as Exhibit 6.
 - g. Summary Investigative Report prepared by Division Compliance Investigator Patrick E. Cherek, with attached exhibits, marked as Exhibit 7.
 - h. 7/23/01 letter from Sawyer County District Attorney Thomas E. Van Roy to Division Compliance Director David D. Tater, marked as Exhibit 8.
3. 5/3/02 Affidavit of Wayne Brunner, with attached Exhibit 1, Midvalleyvu Farms, Inc. Bill of Sale, Boarding Agreement, and Buy-Back Right.

Attached to 7/19/02 Division Brief

1. 7/15/02 Affidavit of William J. Hansen, with attached exhibits listed below.
 - a. Ag 80.15, Wis. Adm. Code, effective 10/1/59, marked as Exhibit 1.
 - b. Ag 80.16, Wis. Adm. Code, certified copy 7/21/67, marked as Exhibit 2.
 - c. Ag. 80.17, Wis. Adm. Code, effective 12/1/80, marked as Exhibit 3.
 - d. 7/20/73 order Adopting Rules including Ag 80.17(7), Wis. Adm. Code, marked as Exhibit 4.
 - e. 9/19/80 order including 80.17(7), Wis. Adm. Code, marked as Exhibit 5.
 - f. Ag 80.17(7), Wis. Adm. Code, effective 8/1/89, marked as Exhibit 6.
 - g. 6/85 Food Division Policy Guideline 4500, marked as Exhibit 7.
2. 7/11/02 Affidavit of C. Thomas Leitzke.

RELEVANT STATUTES AND RULES

S. 97.24(2) REQUIREMENTS FOR MILK AND FLUID MILK PRODUCTS:

GRADE A REQUIREMENT. (a) No person may sell or distribute any milk unless that milk is produced, processed and distributed in compliance with standards established by the department by rule under this chapter.

(b) No person may sell or distribute any milk or fluid milk products which are not grade A milk or grade A milk products to consumers . . . Grade A milk and grade A milk products shall be effectively pasteurized, and shall be produced, processed and distributed in compliance with standards established by the department by rule under this chapter.

(d) This section does not prohibit:

2. Incidental sales of milk directly to consumers at the dairy farm where the milk is produced.

(3) RULES. The department, in consultation with the department of health and family services, shall issue rules governing the production, transportation, processing, pasteurization, handling, identity, sampling, examination, labeling and sale of milk and fluid milk products; the inspection of dairy herds, dairy farms and dairy plants; the issuing and revocation of permits to milk producers and milk haulers, and of licenses to dairy plants and milk distributors. Insofar as permitted by the laws of this state, such rules shall be in reasonable accord with the minimum standards and requirements for milk and fluid milk products currently recommended and published by the U.S. public health service as a milk ordinance and code, except that the requirements for bottling and sterilization of bottles in such standards shall not apply to milk sold by a producer, selling only milk produced by the producer on the producer's dairy farm under the producer's own milk house, which milk meets the requirements of grade A standards as set forth by the department of agriculture, trade and consumer protection, to a purchaser who has provided his or her own container, which has been sanitized in a manner comparable to the sanitizing of the utensils used in the production of milk by the producer, if the purchaser is purchasing milk for his or her own consumption.

ATCP 60.01(23) "Person" means an individual, partnership, firm, association, corporation or any other business unit or entity.

Ag 80.17 Applicability; enforcement. (7) The exemption in s. 97.24(2)(c), Stats., for "incidental sales" of ungraded milk and cream to consumers at farms and dairy plants shall not apply to sales which are regularly made in the course of business or are preceded by any advertising, offer to or solicitation of members of the public, but shall include any sales to employees or persons shipping milk to the dairy plant.

History: Cr. Register, August 1967, No. 140, eff. 9-1-67; renum. from Ag 80.16 to be Ag 80.17, Register, May, 1970, No. 173, eff. 6-1-70; am.(1), (2) and (7), Register, July, 1973, No. 211, eff. 8-1-73; am. (1) to (3) and (5) to (7), Register, November 1980, No. 299, eff. 12-1-80; r. (5) and (6), Register, July, 1989, No. 403, eff. 8-1-89.

Ag 80.15 Enforcement interpretation. (3) The exemption in section 97.046(2)(c), Wis. Stats., for "incidental sales" of ungraded milk and cream to consumers at farms and dairy plants shall not include any sales which are regularly made in the course of business or are preceded by any advertising thereof, or offer to or solicitation of members of the public, but shall include any sales to employees or to persons shipping milk to the dairy plant.

History: Cr. Register, September, 1959, No. 45, eff. 10-1-59.

FINDINGS OF FACT

--Clearview Acres, LLC

1. Respondent Clearview Acres LLC ("Respondent CVA") is engaged in the business of milk production and operates a dairy farm located at 11682 West Tiger Cat Road, Hayward, Wisconsin. Owner Gleta Martin and Manager Tim Wightman operate Clearview Acres.
2. At all times relevant to this proceeding, Respondent CVA has held a milk producer license, number 85297, issued by the Division under s. 97.22(2)(a), Stats., and is subject to ch. 97, Stats., and ch. ATPC 60, Wis. Adm. Code.
3. The Division is authorized under s. 97.22, Stats., to license, regulate, and inspect milk producers in Wisconsin, including Respondent CVA.
4. In May, 2000, based upon Respondent's interest in making ungraded raw milk available to interested parties, Respondent CVA and the Division entered into a Memorandum of Understanding (MOU). This MOU specified how an individual could become a partial owner in a Respondent CVA cow, lease the cow back to Respondent CVA for boarding, milking and then obtain ungraded raw milk from the farm. The MOU provided a unilateral right for either party to terminate the MOU with 30 days notice.
5. Respondent CVA began its "program" called "Milk Direct" to implement the terms of the MOU. It advertised the program's availability, and made available materials and their experiences at meetings, some of which were sponsored by the Marketing Division (now called Division of Agricultural Development) of the Department. Respondent CVA's owner made various material representations about the benefits of raw milk in newspaper advertisements.
6. The buying of "cow-shares" gave the person the right to an undivided interest in a particular cow. The "cow-share owner" had, by paying a "boarding fee" that for each \$2.50, they could obtain one gallon of ungraded raw milk located in a bulk tank filled with commingled raw milk from "their" cow and all other cows milked on the farm. In addition, prior to sending ungraded raw milk to a dairy plant for processing, some of that milk was stored in containers in a refrigerator to ensure availability to persons holding "cow-share" agreements. Respondent CVA would ship milk to a "cow-share" owner, who could not come to the farm to obtain their milk, charging shipping fees, along with boarding fees. Control of the cows, in all aspects, remained with Respondent CVA through a "lease-back agreement" including the fact that all milk, not paid for with a "boarding fee," would be available to Respondent CVA for shipment to a dairy plant or for other activities on the farm. Respondent had first right of refusal for buying back cow shares if a person wished to sell their share.

7. On April 9, 2001, the Division exercised its right to terminate the MOU with a 30-day notice by sending Respondent CVA a termination notice. Although it was not required to do so, the Division listed its reasons for the termination as follows:

"In light of recent development, the expansion of interest by others in the state, and certain marketing practices brought to our attention, the Division of Food Safety performed a serious reassessment of this and other similar agreements. From this reassessment, we conclude that continuation of such agreements are contrary to our department's mission to ensure the safety of the food supply to the consuming public."

8. Following the termination of the MOU, Respondent CVA, in consultation with their attorneys, decided that, given that s. 97.24(2), Stats., allows "incidental sales" of raw milk to consumers on the farm, and the fact that they believed these "cow-share" agreements gave an ownership right that exempted them from any prohibition of obtaining raw milk from their own cows, Respondent CVA continued business under essentially the same terms as before, but without the MOU with the Division. No more than 25% of its business came from these cow-share agreements.

9. On September 18, 2001, the Division issued a complaint against Respondent CVA alleging nine counts of illegally selling raw milk and one count of illegally advertising the availability of raw milk at Respondent's premises.

10. On December 21, 2001, the Division ordered that Respondent CVA was restrained and enjoined from selling or distributing unpasteurized raw milk, in violation of s. 97.24, Wis. Stats., pursuant to a finding of an imminent health hazard due to an outbreak of *Campylobacter* infections traced to milk obtained from Respondent CVA. Respondent CVA has not provided raw milk directly to the holders of its cow-share agreements since that time.

--Midvalleyvu Farms--

11. Respondent Midvalleyvu Farms, Inc. ("Respondent MVF") is engaged in the business of milk production and operates a dairy farm located at W8481 County Road Z, Arkansaw, Wisconsin. Owners Wayne and Janet Brunner operate Midvalleyvu Farms.

12. At all times relevant to this proceeding, Respondent MVF has held a milk producer license, number 14958, issued by the Division under s. 97.22(2)(a), Stats., and is subject to ch. 97, Stats., and ch. ATCP 60, Wis. Adm. Code.

13. The Division is authorized under s. 97.22, Stats., to license, regulate, and inspect milk producers in Wisconsin, including Respondent MVF.

14. Respondent MVF began to formulate its own plan to offer "cow-share" agreements after attending a Marketing Division-sponsored "Value Added Conference" where the operators of Respondent CVA gave a presentation about their "Milk Direct" program.

15. Once Respondent MVF learned that the Division had terminated its MOU with Respondent CVA, Respondent MVF continued to consult with the operators of Respondent CVA and decided to implement its own cow-share "Milk Direct" program under almost-identical terms as that used by Respondent CVA. No more than 5% of its business came from these cow-share agreements.

16. On January 17, 2002, the Division issued a complaint against Respondent MVF alleging nine counts of illegally selling raw milk and one count of illegally advertising the availability of raw milk at Respondent's premises.

--Judicial Notice--

17. As of August 31, 2002, the Department's Division of Food Safety had issued milk producer licenses to 17,248 persons, as defined in ATCP 60.01(23), Wis. Adm. Code.

18. Many, if not all, milk producers and their employees take ungraded raw milk directly from the farm bulk tank for their personal and family use. This activity is essentially unregulated by the Division.

19. Milk, as a commodity for sale for human consumption, is one of the most heavily regulated food products in the United States. The United States Department of Health and Human Services ("HHS"), through the Public Health Service ("Service") Food and Drug Administration ("FDA") has, since 1924, issued the Pasteurized Milk Ordinance ("PMO") that is a model milk regulation to assist states and municipalities in "initiating and maintaining effective programs for the prevention of milkborne disease."

PREFACE, Grade "A" Pasteurized Milk Ordinance, 1999 Revision, pp. v.

20. The PMO, in its **FOREWARD** section, clearly outlines the reasoning behind this high federal, state and local regulatory scheme:

"The milk sanitation program of the United States Public Health Service is one of its oldest and most respected activities. The interest of the Public Health Service in milk sanitation stems from two important public health considerations. First, of all foods, none surpasses milk as a single source of those dietary elements needed for the maintenance of proper health, especially in children and older citizens. For this reason, the Service has for many years promoted increased milk consumption. Second, milk has a potential to serve as a vehicle of disease and has, in the past, been associated with disease outbreaks of major proportions.

The incidence of milkborne illness in the United States has been sharply reduced in recent years. In 1938, milkborne outbreaks constituted 25 percent of all disease outbreaks due to infected foods and contaminated water. Our most recent information reveals that milk and fluid milk products continue to be associated with less than 1

percent of such reported outbreaks. Many groups have contributed to this commendable achievement, including Public Health and Agricultural agencies, dairy and related industries, several interested professional groups, educational institutions and the consuming public. The Public Health Service is proud to have contributed to the protection and improvement of the milk supply of the nation through technical assistance, training, research, standards development, evaluation and certification activities.

Despite the progress that has been made, occasional milkborne outbreaks still occur, emphasizing the need for continued vigilance at every stage of production, processing, pasteurization and distribution of milk and milk products. During the past decade, problems associated with the sanitary control of milk and milk products have become extremely complex because of new products, new processes, new chemicals, new materials and new marketing patterns, which must be evaluated in terms of their public health significance. The *Grade "A" Pasteurized Milk Ordinance—1978* Recommendations of the United States Public Health Service/Food and Drug Administration, 1999 Revision translates this new knowledge and technology into effective and practicable public health practices.

The responsibility for insuring the ready availability and safety of milk and milk products is not confined to an individual community or a State, or to the Federal Government, it is the concern of the entire nation. With the continued cooperation of all interested groups engaged in the sanitary control of milk and milk products, including Government and industry, such responsibility can be accepted with confidence."

PMO, 1999 Revision, pp. iii.

21. From 1959 through 1994, the Department's rules contained a provision that interpreted s. 97.24(2)(d), Wis. Stats. Although the rule was not included in the extensive revision of ch. Ag 80, Wis. Adm. Code, into ch. ATCP 60, Wis. Adm. Code, there is no evidence that the Department's essentially unchanged 35-year interpretation was no longer valid.

22. In addition, the Division's Policy Guideline – 4500, dated June, 1985, and continuing in force today, sets forth the language that came from s. Ag 80.17(3), Wis. Adm. Code and further specifies:

1. On the farm:

- (a) Must be confined to milk.
- (b) Can be regular sales to employees on farm.
- (c) Can be an "incidental sale" to a member of the public but repeat or regular sales will not qualify as "incidental."
- (d) Sale must be directly to consumer. It does not provide for resale or sale for consumption at picnics or dinners.
- (e) Can be in containers furnished by consumer.

23. The Department, through its Division of Agricultural Development (formerly known as the Marketing Division) promotes farm operator direct marketing of products, including the concept of community supported agriculture (CSA). In a CSA, the farm

operator contracts with consumers to buy shares of the product produced on the farm and, during the course of the growing season, receive a weekly bag of produce that has been harvested. The consumer, in essence, contracts for a share of product, but its share is not a share in the ownership of the farm, fields, plants or any other part of the farm operation.

24. Under applicable Wisconsin law, the Wisconsin Department of Financial Institution, through its Division of Securities, regulates the offerings and sale of investment shares in this state, with a particular concern that the investor is fully informed about their investment. As the Department's website explains:

"The regulatory concern with full disclosure is addressed in part by the registration requirements and exemption provisions contained in the Law. To conduct an offering, it is often required that an application or notice be filed with the Division. The filing requirements depend on the registration or exemption provision relied upon. In some cases, the filing requirements may be minimal. In other cases, it will be necessary to file a disclosure document, typically called a "prospectus" or "offering circular", and various exhibits. Regardless of an issuer's filing requirements (even if there are none!), the "anti-fraud" provisions of the Wisconsin law* are applicable to every securities transaction in this state, and that law requires all material facts regarding the issuer and the offering to be disclosed to prospective investors."

***S. 551.41 Sales and purchases.** It is unlawful for any person, in connection with the offer, sale or purchase of any security in this state, directly or indirectly:

- (1) To employ any device, scheme or artifice to defraud;
- (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
- (3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

CONCLUSIONS OF LAW

(1) The department is responsible for the administration and enforcement of ch. 97, Stats., (Food Regulation) and Ch. ATCP 60, Wis. Adm. Code (Dairy Farms). The department has jurisdiction over the subject matter of these proceedings and over the parties under ch. 227, Stats., and ch. ATCP 1, Wis. Adm. Code.

(2) Under rules of statutory construction, the courts have developed three standards of judicial deference applicable to agencies' legal interpretations. "The weight that is due an agency's interpretation of the law depends on the comparative institutional capabilities and qualifications of the court and the administrative agency." *State ex. rel. Parker v. Sullivan*, 184 Wis.2d 668, 699, 517 N.W.2d 449 (1994); *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996). "When the agency uses its expertise to interpret a statute, we accord the agency one of two levels of deference, namely 'due weight,' or 'great weight.'" *CBS, Inc. v. LIRC*, 219 Wis.2d 565, 573, 579 N.W.2d 668 (1998).

(3) "Great weight" is given to legal interpretations if four requirements are met: "(1) the agency was charged by the legislature with the duty of administering the statute; (2) that the interpretation of the agency is one of long-standing; (3) that the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) that the agency's interpretation will provide uniformity and consistency in the application of the statute."

UFE, 201 Wis.2d at 284; *Harnischfeger Corp. v. LIRC*, 196 Wis.2d 650, 660, 539 N.W.2d 98 (1995). Such deference is also accorded "to an agency's interpretation 'if it is intertwined with value and policy determinations' inherent in the agency's statutory decisionmaking function." *Barron Elec. Cooperative v. PSC*, 212 Wis.2d 752, 761, 569 N.W.2d 726 (Ct. App. 1997). Furthermore, "The correct test under Wisconsin law is whether [the agency] has experience in interpreting a particular statutory scheme, not whether it has ruled on precise, or even substantially similar, facts before." *Town of Russell Volunteer Fire Dept. v. LIRC*, 223 Wis.2d 723, 733, 589 N.W.2d 445 (Ct. App. 1998)

(4) Under great weight deference, "an agency's interpretation must then merely be reasonable for it to be sustained." *Harnischfeger*, 196 Wis.2d at 661. "[A] more reasonable interpretation will not overcome an agency's interpretation, as long as the agency's interpretation falls within a range of reasonableness." *UFE*, 201 Wis.2d at 287-88 n.3. "The burden of proof to show that the agency's interpretation is unreasonable is on the party seeking to overturn the agency action; it is not on the agency to justify its interpretation." *Harnischfeger*, 196 Wis.2d at 661.

(5) In this case, the Division's interpretation of s. 97.24(2)(d)2., Wis. Stats., meets the standard for giving it great weight deference. First, the Department is the agency charged by the legislature with the duty of administering the statute and the entire regulatory scheme involving milk production, handling, delivery, processing, and sales. Second, the interpretation has been unchanged since approximately 1959. The Legislature itself has approved that interpretation through the many times the previous rule was amended only in technical form and passed through legislative review. Third, the Department utilized the Division's staff expertise and knowledge of the federal government standards, milk production practices, and public health concerns involving milk safety issues and handling milk on the farm in formulating the interpretation. Finally, the application of the interpretation, with its emphasis on occasional, casual sales, not routine and not accompanied by any advertising, allows for uniformity and consistency in enforcement. The only exception in the prohibition of routine sales or use is for the farm operator or employees, since those persons are directly responsible for the safety of the milk and have the knowledge and direct experience to make the judgment to utilize the ungraded raw milk directly from the farm bulk tank.

(6) The Respondents might argue that the interpretation should be looked at under the "due weight" standard, that only overturns an agency interpretation if a more reasonable interpretation is available. *Barron*, 212 Wis.2d at 763, *UFE*, 201 Wis.2d at 287 n.3. However, even under this standard, the Respondents' suggested alternative fails. The exception in allowing incidental sales of raw milk from the farm is one where the

transaction is outside the normal, highly regulated environment under which milk is procured, processed and sold to the public. It is essentially unregulated. By having a standard whereby any person can sell raw milk based upon some percentage, necessarily brings the transactions back into the regulated environment, as the Division will have to continually monitor every operator selling raw milk to ensure their compliance with the standard. Moreover, that interpretation makes for a non-uniform standard and makes it more difficult for the Division to enforce. Thus, the Respondents' proffered interpretation is less reasonable than the Division's and, therefore, the Division's interpretation is sustained.

(7) The Division's interpretation of s. 97.24(2)(d)2., Wis. Stats., clearly allows regular distribution of ungraded raw milk to the "persons" shipping the milk and their employees. The person shipping milk includes the underlying owners, if the entity holding the milk producer license is a partnership, association, corporation, firm or any other legal business entity. However, I find the "cow-share" agreements or any similar instruments used by the Respondents do not place them outside the requirements of the statute.

(8) In these cases, there are no true indications of ownership of an individual cow that entitles the transaction to fall outside the statute's bounds. The "cow-share" owners have no control, in any meaningful sense, over the animal that they've "purchased" a share in. There is no regular way to trace the milk any shareholder receives to the individual cow in which they've purchased a share. The amount of money for the share is nominal. In fact, the other amounts paid are directly tied to an amount of milk received, but not to the amounts of milk any individual cow produces or actual costs for "boarding" the cow, which is how the monies paid are characterized as paying for. What these shares really are more akin to is the direct marketing practice, known as community supported agriculture (CSA), where a person purchases a share of the "product" but is not an owner of the farm. Although CSAs may be utilized for all types of farm product sales, they are not permitted for the sale of ungraded raw milk, pursuant to s. 97.24, Wis. Stats.

(9) The Respondents do, however, have a legal venue for legitimately working with those persons who wish to obtain ungraded raw milk for their use. The Division's statutory interpretation clearly allows *owners* of the entity holding the milk producer license to obtain ungraded raw milk for their personal use. Nothing that was concluded as to the "cow-share" agreements failing as a vehicle for ownership would apply to buying an equity share in the entity holding the milk producer license. However, this finding implicitly requires that any such equity offerings or sales comply with the applicable securities laws, administered by the Wisconsin Department of Financial Institution's Division of Securities. While each Respondent (and any other milk producers contemplating such a venture) would have to make its own judgment as to the feasibility and desirability of entering into such agreements, what is clear is that a properly drafted agreement should satisfy the interpretation behind s. 97.24(2)(d)2., Wis. Stats. From a public health standpoint, the Legislature has decided that general sales of ungraded raw milk are prohibited. However, in interpreting the statute, the Department recognizes an exception for those persons willing to take on the responsibilities of owning a milk producer license. A holder of a milk producer license may want to make a legitimate agreement to share those

responsibilities. If the potential purchaser understands the benefits and risks through full disclosure, as required under applicable statutes, then all are in a position to make the informed choice to obtain their milk in its ungraded raw form.

ORDER

NOW, THEREFORE, IT IS ORDERED, pursuant to ch. 227, Stats., that:

(1) The Department upholds the long-standing interpretation of the Division of Food Safety that "incidental sales" as used in s. 97.24(2)(d)2., Wis. Stats., shall not apply to sales which are regularly made in the course of business or are preceded by any advertising, offer to or solicitation of members of the public, but shall include any sales to employees or persons shipping milk to the dairy plant.

(2) The Division of Food Safety shall take immediate steps to reinstate this interpretation to the appropriate rules chapters in the Department's administrative code.

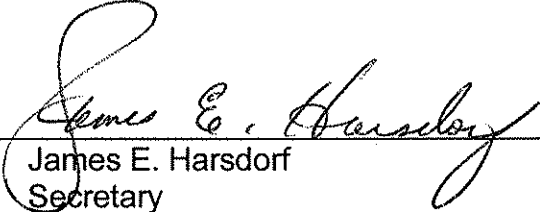
(3) The Respondents' current "cow-share" agreements with any members of the public are not legal ownership agreements that place the transactions outside the requirements of s. 97.24, Wis. Stats. The Respondents, and any other persons similarly situated, have ten days, following their receipt of this order, to cease and desist any practices for the regular delivery of ungraded raw milk in any manner inconsistent with this order and the requirements of s. 97.24, Wis. Stats., as interpreted by this decision.

(4) Under the long-standing interpretation of s. 97.24, Wis. Stats., the Respondents are free to devise valid agreements sharing ownership in their milk producer license under applicable law that may include allowing actual owners to take a share of the ungraded raw milk produced under the license.

Dated this 30th day of October, 2002.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: _____


James E. Harsdorf
Secretary